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OCT 24 1987
JOSEPH F. SPANIOL, JR.
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NO. 87-98

In the Supreme Court of the United States

OCTOBER TERM, 1987

BRUCE AND JOANNE BROWN,
Petitioner's

versus

COMMISSIONER OF INTERNAL REVENUE
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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EDITOR'S NOTE

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REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITIONER's WRIT OF CERTIORARI

In respondent's Memorandum in Opposition two new arguments are raised. Pursuant to Supreme Court Rules of Practice No. 22.5 response is hereby made to those two arguments.

1. Respondent contends that there is no conflict between the circuits and voluntarily attempts to set forth the standard that "the question of ownership depends on the particular circumstances on each case and the passage of legal title is not necessarily determinative" (footnote five of the respondent's Memorandum). Respondent is proposing a new test since he is unable to reconcile the various decisions of the several circuits and expressly the decision of the 5th Circuit. Perhaps this new standard would be appropriate, perhaps not, but it is in conflict with that expressed by the Supreme Court in *Commissioner v. Brown*, (Supreme Court 1965) 380 U.S. 563 upon which the Tax Court expressly relied in deciding the instant case.

2. Respondent alleges that there is no conflict internally within the 5th Circuit between *Boykin* (5th Circuit 1955) 344 F2d 889 and the instant case. In the instant case the 5th Circuit affirmed pre curiam the decision of the Tax Court which relied on the passage of legal title test. By its affirmation the 5th Circuit adopted the opinion and reasoning of the Tax Court. F.R.A.P. 47.6.

3. In its Memorandum of Opposition respondent raises the issue of fraud as being relevent on the determination of whether a sale for tax purposes had been made. Respondent alleges that the tax benefits obtained were offset by the casualty loss deduction and resulted in income tax savings. Respondent ignores the stipulated fact that

the ranch in question was flooded between August 1st and 3rd of 1978; but on September 25, 1978 petitioner applied for an SBA Loan in the amount of $737,000.00, stating on his application that he "had acquired"the ranch (Exhibit 36-AJ) The SBA loaned petitioners $147,800.00 on November 14, 1978. The MAI Appraisal was not delivered to petitioner until May 3, 1979. However, the so called back dating of documents occured on February 6, 1979. The income tax deficiency arising from the disallowance of the casualty loss amounts to $194,326.00. From these facts respondent argues that petitioner paid the agreed price of $750,000.00 plus borrowing $147,800.00 in order to obtain a deduction that saved him $194,326.00 in income tax. Respondent asserts that the purchase "structured as it was" demonstrates lack of beneficial ownership. In reality what business man would pay $750,000.00 plus $147,800.00 in order to reduce his income tax by $194,326.00 and do so before he even knew the amount of the damages? Respondents new argument itself clearly demonstrates the need for the test of burdens of ownership as the proper standard to reflect the realities in this case rather than the technical passage of legal title as was applied by the Tax Court and affirmed by the 5th Circuit per curiam.

PROOF OF SERVICE

The undersigned attorney of record for Petitioners, Bruce and Joanne Brown, hereby certifies as follows:

(A) That I, Towner Leeper, a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the rules of said Court to be served with the foregoing Reply to Respondent's Memorandum in Opposition to Petitioner's Writ of Certiorari, as hereinafter shown:

(B) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Charles Fried
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

The Honorable Roger M. Olsen
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Michael L. Paup
Charles E. Brookhart
Robert L. Baker
Attorneys, Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

(C) That on this day, I serve three printed copies of the foregoing Petition for Certiorari on the said Charles Fried and the said Roger M. Olsen, Michael L. Paup, Charles E. Brookhart and Robert L. Baker, Attorneys for said Respondent, by depositing same in the United States Mail First Class properly addressed to said Attorneys for Respondent at their said address.

Executed this 21st day of October, 1987.

Towner Leeper Attorney for
Petitioners
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